Supreme Court, U.S.
FILED
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No. 92-1199

In The

Supreme Court of the United States

October Term, 1992

CHARLES ASHLEY,

Petitioner,

versus

EPIC DIVERS, INC. AND
CIGNA INSURANCE COMPANY,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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23 pp

QUESTION PRESENTED FOR REVIEW

Whether the petitioner, who worked on short voyages on a number of unrelated vessels, can qualify as a Jones Act seaman without demonstrating the connection to a vessel or organized fleet of vessels that traditionally has distinguished seamen from longshoremen and other transitory maritime workers.

LIST OF PARTIES TO THIS PROCEEDING

1. Charles Ashley
2. Epic Divers, Inc.
3. CIGNA Insurance Company

Neither Epic Divers, Inc. nor CIGNA Insurance Company has any parent corporations, or any subsidiaries that are not wholly-owned.

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below.

The petitioner, a commercial diver employed by Epic Divers, Inc., sued Epic and Epic's maritime employer's liability insurer, CIGNA Insurance Company (both hereinafter referred to as "Epic"), under the Jones Act, 46 U.S.C. §688, and the general maritime law, alleging that he sustained personal injuries while engaged in a dive in the Mississippi River near Avondale, Louisiana on November 20, 1990. Epic moved for summary judgment on the basis that the plaintiff was not a seaman within the meaning of the Jones Act, but a maritime worker covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.* ("LHWCA").The two acts are mutually exclusive. *McDermott International, Inc. v. Wilander,* ___ U.S. ___, 111 S.Ct. 807, 112 L.Ed. 2d 866 (1991). The district court granted the Motion, ruling that the petitioner did not perform a substantial part of his work aboard a particular vessel or fleet of vessels, and did not perform traditional maritime activities.

In an unpublished *per curiam* opinion the United States Court of Appeals for the Fifth Circuit affirmed. The Fifth Circuit applied the test for seaman status from its decisions in *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959) and *Barrett v. Chevron, U.S.A., Inc.,* 781 F.2d 1067 (5th Cir. 1986) (en banc). The test requires a worker attempting to qualify as a Jones Act seaman to demonstrate: 1) that he either was permanently assigned to a vessel or fleet of vessels or performed a substantial part of his work on a vessel or fleet; and 2) that his work

contributed to the function or mission of the vessel or fleet. The Fifth Circuit framed the issue in this case as whether or not the petitioner performed a substantial part of his work on a fleet of vessels. The Fifth Circuit held that the petitioner, who worked on short voyages on a number of unrelated vessels, failed as a matter of law to demonstrate the attachment to a fleet of vessels required for Jones Act status, and was a transitory maritime worker.

The petitioner's petition for rehearing was denied. This petition for writ of certiorari followed.

B. Statement of the Facts

Epic is a company that supplies divers and diving services to its customers in various industries, including offshore oil and gas production, ship repair, and underwater construction. Epic does not own or operate vessels of any type.

The petitioner is a diver who began working for Epic in August, 1990. He worked a total of five separate diving jobs, none of which lasted more than four days, during his four-month term of employment. He was involved in an accident during the fifth and final diving job he performed for Epic.

The petitioner's first diving job for Epic commenced on August 16, 1990. Epic's customer, Torch, Inc. ("Torch"), asked Epic to supply a diver to check and replace anodes on an offshore pipeline. The petitioner was transported to a Torch-owned barge by a crew boat. The petitioner

worked only as a diver during the four-day job. He did not perform any maintenance work aboard the barge nor did he assist in the barge's navigation. When the petitioner left the job site on August 19, 1990, the barge remained on location to complete its mission.

The petitioner's second diving job lasted from August 23, 1990 through August 26, 1990. The petitioner dove from the barge LITTLE SHANE, owned by Torch. The petitioner performed only diving work, which involved setting a riser and boat bumpers on an offshore oil production platform. The petitioner reached the job site by crew boat. When the petitioner left the job site, the LITTLE SHANE remained offshore to complete its work.

The petitioner's third diving job lasted one day. Epic's customer, Chevron U.S.A., Inc. ("Chevron"), requested that Epic supply a diver to survey a mud mat underneath an oil production platform. This dive was performed off a stationary mud boat on September 9, 1990.

The petitioner's fourth diving job was also performed pursuant to a contract between Epic and Chevron. This job lasted from November 13, 1990 through November 17, 1990, during which time the petitioner installed a clamp on a Chevron oil production platform. In addition, he engaged in the "scrapping", or removal, of old natural gas flow lines in a natural gas production field. The scrapping work was performed from very small barges that were rigged specifically for the shallow waters of the natural gas field. The petitioner returned to shore each evening during the course of the job to sleep

in a bunkhouse. The scrapping work was performed in water shallow enough to allow the petitioner to stand and walk the bay bottom with his head above water for a good portion of the job.

The petitioner was injured on the first day of his final diving job for Epic. Avondale Industries, Inc. ("Avondale") had asked Epic to supply a diver to place a plywood cover over an open grate beneath the water line of a Navy ship which was docked for repairs at Avondale's shipyard on the Mississippi River. This job was expected to last only one day. Avondale provided a small boat for the petitioner's diving equipment. The boat was moored next to the dock.

The petitioner was never permanently assigned to any of the barges or dive boats he worked aboard during the four months he was employed by Epic. His work aboard any one vessel never exceeded four days. The petitioner never remained aboard any vessel for the duration of its voyage. The assortment of vessels he worked aboard were neither owned nor controlled by Epic. With the exception of the two Torch-owned barges on which the petitioner worked on his first two diving assignments, no two vessels off which the petitioner performed his work were owned by the same company. No evidence of record suggests that any of the vessels operated together or under one control. As the petitioner acknowledges, he spent all of his time working as a diver. He did not assist in navigation or maintenance of the vessels.

SUMMARY OF REASONS FOR DENYING THE WRIT

The Jones Act provides a cause of action in negligence against an employer of "any seaman" injured "in the course of his employment." The LHWCA provides a compensation remedy to land-based maritime workers. The two acts are mutually exclusive. *Wilander,* 111 S.Ct. at 813.

The Fifth Circuit has adopted a two-pronged standard by which it distinguishes land-based workers from sea-based workers. In this case the Fifth Circuit stated the standard as follows:

> To qualify as a Jones Act seaman, Ashley must show: (1) he was permanently assigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet; and (2) his work contributed to the function or mission of the vessel or fleet.

App. to Pet. for Cert. A-2. The Fifth Circuit's test for seaman status is consistent with Supreme Court authorities stating that the key to seaman status is employment-related connection to a vessel in navigation. *Wilander,* 111 S.Ct. at 817. *Southwest Marine, Inc. v. Gizoni,* ___ U.S. ___, 112 S.Ct. 486, 492 (1991).

The petitioner misstates the first part of the Fifth Circuit's standard as requiring permanent attachment to a specific vessel or fleet of vessels as an absolute requirement for all seamen. In fact, the test is more liberal, and allows a finding of seaman status based on proof of substantial work on a vessel or fleet of vessels. The Fifth Circuit did not decide this case solely on the basis of the

petitioner's lack of permanent attachment to a specific vessel or fleet of vessels.

The petitioner relies on Fifth Circuit cases that have been overruled *sub silentio* in the Fifth Circuit. The petitioner also relies on Supreme Court authorities concerning longshoremen's remedies against vessel owners. The issue here involves the seaman status of a commercial diver. Moreover, the Supreme Court authorities relied on by the petitioner concerning the remedies available to longshoremen against vessel owners were overruled by Congress in the 1972 amendments to the LHWCA.

REASONS FOR DENYING THE WRIT

The Jones Act provides a cause of action in negligence against an employer of "any seaman" injured "in the course of his employment". 46 U.S.C. §688. The LHWCA provides a compensation remedy to land-based maritime workers. The LHWCA excludes from its coverage "a master or member of a crew of any vessel." 33 U.S.C. §902(3)(G). In reviewing the history and interrelationship of the LHWCA and the Jones Act, this Court, in *Wilander,* noted that the Jones Act and the LHWCA are mutually exclusive:

> "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. . . .
>
> With the passage of the LHWCA, Congress established a clear distinction between land-

> based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen.

111 S.Ct. at 813.

The Fifth Circuit has adopted, in its decisions in *Robison* and *Barrett*, a two-pronged test by which it distinguishes land-based workers from sea-based workers. However, the petitioner misstates the first prong of the Fifth Circuit's test for seaman status as requiring permanent attachment to a specific vessel or a specific commonly-owned fleet of vessels as "an absolute requirement for all seamen under all circumstances". Pet. for Cert., p. 7. In fact, the first prong of the test can be satisfied by substantial work on a particular vessel or fleet of vessels.

The petitioner asks this Court to grant the writ based on perceived inconsistencies between his version of the Fifth Circuit's test for seaman status and this Court's decisions in *Wilander, Reed v. Steamship Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448 (1963), and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488 (1967). The writ should be denied because the petitioner has misstated the Fifth Circuit's test for seaman status in his petition and because the Fifth Circuit's test for seaman status is consistent with Supreme Court authorities.

A. The Petitioner has Misstated the Fifth Circuit's Test for Seaman Status.

In *Robison*, the court held that there is an evidentiary basis for a Jones Act case to go to the jury on the question of seaman status:

> 1) if there is evidence that the injured worker was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and
>
> 2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

266 F.2d at 779.

The two-pronged *Robison* standard contemplated seaman status in terms of a worker's connection with a single vessel. In *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523 (5th Cir. 1960), the Fifth Circuit held for the first time that nothing in the *Robison* test precluded seaman status by virtue of a connection to "several specified 'vessel[s]'." 280 F.2d at 528. In subsequent decisions, the Fifth Circuit used *Braniff* as the basis for allowing seaman status on proof of an assignment to an identifiable group of vessels. This extension of *Robison* was affirmed by the Fifth Circuit, sitting *en banc*, in *Barrett*. 781 F.2d at 1074-1076.

After *Robison* was liberalized by the Fifth Circuit to include the fleet-of-vessels standard, there were four ways that a worker could qualify as a seaman. First, the worker could be permanently assigned to a specific vessel. Second, the worker could be permanently assigned to a fleet of vessels. Third, a worker not permanently

assigned to a vessel could qualify as a seaman by performing a substantial part of his work on that vessel. Fourth, a worker could qualify as a seaman by performing a substantial part of his work on a fleet of vessels.

The petitioner argues that the Fifth Circuit, by its ruling in this case, has imposed a requirement of permanency in all seaman status cases. The Fifth Circuit has made no such imposition. The first prong of its seaman status test can be satisfied by showing either permanent attachment to, or substantial work aboard, a vessel or fleet of vessels. In this case the Fifth Circuit stated:

> To qualify as a Jones Act seaman, Ashley must show: (1) he was permanently assigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet; and (2) his work contributed to the function or mission of the vessel or fleet.

App. to Pet. for Cert. A-2.

This case is not about permanent attachment. The issue here, as the Fifth Circuit stated in its *per curiam* opinion, is whether or not the petitioner performed a substantial part of his work aboard a fleet of vessels, so as to distinguish the petitioner from a transitory maritime worker. App. to Pet. for Cert. A-2, A-3. The petitioner never seriously argued that he was permanently attached to any one of the five vessels from which he worked during his employment with Epic. Indeed his connection to any specific vessel, far from being permanent, did not even amount to a substantial part of his work. The petitioner did not visit any one vessel for more than four days. Since the vessels were not acting together or under one control, the Fifth Circuit concluded that they did not

constitute a fleet, and that the petitioner could not demonstrate a connection to vessels sufficient to confer seaman status.

Rule 15.1 of the Rules of the Supreme Court of the United States requires a brief in opposition to a petition for certiorari to address:

> [A]ny perceived misstatements of fact or law set forth in the petition which would have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case.

The issues presented by the petitioner in his writ for certiorari should not be decided by the Court. The Fifth Circuit clearly grounded its decision, not on any requirement of permanent attachment to a vessel, but on the question of whether the petitioner could demonstrate connection to a fleet of vessels by showing he performed a substantial part of his work aboard a group of vessels acting together or under one control.

B. The Fifth Circuit's Test for Seaman Status is Consistent with Supreme Court Authorities.

In its recent decisions in *Wilander* and *Gizoni,* this Court emphasized that connection to vessels is the key to seaman status. In *Wilander,* the plaintiff was injured while assigned to a single vessel, the M/V GATES TIDE, a paint boat chartered to Wilander's employer. Wilander sued his

employer seeking recovery under the Jones Act for his employer's negligence. His employer moved for summary judgment and the district court denied the motion. The jury found that Wilander satisfied both prongs of the *Robison* seaman status test. 111 S.Ct. at 809.

On appeal to the Fifth Circuit, the determination of seaman status was affirmed. *Id.* Wilander's employer had asked the Fifth Circuit to reject the *Robison* requirement that a seaman "contribut[e] to the function of the vessel or to the accomplishment of its mission" and replace the second prong of the *Robison* test with a requirement that a seaman aid in the navigation of the vessel. The "aid in navigation" test was adopted by the Seventh Circuit in *Johnson v. John F. Beasley Construction Company,* 742 F.2d 1054 (7th Cir. 1984). The Fifth Circuit reaffirmed the rule of *Robison* and rejected the *Johnson* test. This Court granted certiorari to resolve the conflict between the *Robison* and *Johnson* tests with respect to the transportation/navigation function requirement, and affirmed the Fifth Circuit. 111 S.Ct. at 809-810.

In rejecting the aid to navigation test, this Court stated:

> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law, and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction. All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.

> See generally Robertson, A New Approach to Determining Seaman Status, 64 Texas L.Rev. 79 (1985). It is not the employee's particular job that is determinative, but the employee's connection to a vessel.

111 S.Ct. at 817.

This Court then stated:

> The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. . . . In this regard, we believe the requirement that an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission" captures well an important requirement of seaman status.

Id.

This Court cited parts of these passages from *Wilander* in *Gizoni,* a case involving the seaman status of a worker whose occupation was one enumerated in the LHWCA. In rejecting the concept that seaman status depends on job title or occupation, this Court again emphasized that "The key to seaman status is employment-related connection to a vessel in navigation . . . " 112 S.Ct. at 492 (citing *Wilander,* 111 S.Ct. at 817). This Court has thus underscored the importance of both the first prong of the *Robison* test and the second prong, which requires that a worker's duties contribute to the function of the vessel or to the accomplishment of its mission.

The Fifth Circuit's liberal first prong of its test for seaman status allows a worker to qualify as a seaman not only by proving connection to a single vessel but also by proving connection to a fleet of vessels. In *Barrett*, the court, mindful of the land-based/sea-based distinction made by Congress in enacting the LHWCA, defined the term "fleet" as follows:

> By fleet we mean an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated.

781 F.2d at 1074. This definition of "fleet" prevents classic transitory maritime workers, such as longshoremen and ship repairers, who spend virtually all of their time working for relatively short periods of time aboard unconnected vessels, and who owe their allegiance to a land-based employer, from qualifying as Jones Act seamen.

The *Barrett en banc* decision raised, but did not decide, the question of whether an exception to the fleet requirement might be made for some workers. In its recent decision in *Bach v. Trident Steamship Company, Inc.*, 920 F.2d 322 (5th Cir. 1991), *vacated* ___ U.S. ___, 111 S.Ct. 2253, 114 L.Ed. 2d 707, *reinstated on remand*, 947 F.2d 1290 (1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1996 (1992), the Fifth Circuit answered this question in the negative:

> Dozens (perhaps hundreds) of seaman status cases have come before us, but we have never

> made an exception to the core requirement that the injured worker show attachment to a vessel or identifiable fleet of vessels. We decline the invitation now to make a wholesale exception to a test that has served us for so long.

920 F.2d at 326.

The petitioner argues that the *Robison* test should be cast aside in favor of a test he gleans from two Fifth Circuit cases, *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), and *Wallace v. Oceaneering International*, 727 F.2d 427 (5th Cir. 1984). The petitioner contends that *Wallace* and *Bertrand* both stand for the proposition that any group of vessels aboard which a worker happens to work can qualify as a fleet for purposes of the first prong of the *Robison* test. The petitioner argues that he would qualify as a seaman under the holdings in *Bertrand* and *Wallace*.

Barrett effectively overrules *Wallace*, since *Wallace*, decided three years earlier, was grounded on the premise that "fleet" meant any group of vessels an employee happened to work aboard. 727 F.2d at 434-435. *Wallace* is also factually distinguishable from this case, since the plaintiff there was to be assigned permanently to one vessel. 727 F.2d at 430. Although the Fifth Circuit did not overrule *Bertrand* in its *Barrett* decision, *Bertrand* does not survive *Bach*, in which the Fifth Circuit expressly made the fleet requirement applicable to all workers trying to demonstrate seaman status by connection to more than one vessel. 920 F.2d at 326.

The Fifth Circuit's seaman status test is consistent with this Court's recent decisions in *Wilander* and *Gizoni*.

The petitioner is attempting to capitalize on a perceived conflict between *Wallace* and *Bertrand* on the one hand, and *Barrett* and *Bach* on the other. *Wallace* and *Bertrand* are anomalies in a long line of seaman status cases in the Fifth Circuit that emphasize connection to vessels as the key to seaman status. This Court should not grant certiorari to resolve a conflict that has already been settled within the Fifth Circuit.

The petitioner also argues that the Fifth Circuit's so-called permanency requirement conflicts with this Court's decisions in *Reed* and *Jackson*. Petitioner argues that since divers are assigned to work on vessels belonging to others, they are necessarily assigned to vessels not under common ownership or control. The petitioner argues that a diver's employer ought not be able to escape liability under the Jones Act by contractual arrangements with third parties, citing *Reed* and *Jackson*.

As the petitioner concedes, when the *Reed* and *Jackson* cases were decided longshoremen had the right to sue a vessel owner for damages under the doctrine of unseaworthiness. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). In both *Reed* and *Jackson*, so-called "Sieracki seamen" sued shipowners who had employed the longshoremen directly to unload vessels, instead of hiring a stevedore who employed longshoremen. Since longshoremen could not sue their employers directly because of the LHWCA's exclusive recovery feature, the defendants in *Reed* and *Jackson* argued that the longshoremen in those cases could not sue the ship, since the ship was acting as an employer. *Jackson*, 87 S.Ct. at 1421-1422. In *Reed* and *Jackson*, this Court concluded that longshoremen employed directly by

shipowners could sue the shipowners directly despite the exclusive recovery provisions of the LHWCA. *Reed*, 83 S.Ct. at 1353; *Jackson*, 87 S.Ct. at 1422.

The legal and theoretical underpinnings of the *Reed* and *Jackson* cases have long been legislatively removed. The *Sieracki* case, decided in 1946, was overruled in 1972 when Congress amended the LHWCA to eliminate a longshoreman's unseaworthiness remedy against a vessel. *Wilander*, 111 S.Ct. at 813.

Most importantly, however, the issue in both *Reed* and *Jackson* was not the status of the workers involved, but rather the remedies available to longshoremen whose status as "Sieracki seamen" was undisputed. Here the issue is whether the petitioner has the status of a Jones Act seaman. In fashioning his argument based on *Reed* and *Jackson*, the petitioner assumes that all divers are seamen and then argues that all divers will lose their seamen's rights if the Fifth Circuit's decision is allowed to stand. In actuality, the connection of many divers with vessels more closely resembles that of longshoremen or ship repairers. Many divers, like longshoremen, typically do not work exclusively aboard one vessel or a group of vessels acting together or under one control. The nature of the diving business dictates that some diving companies do not operate vessels, and that divers may not have a substantial connection to particular vessels. Because the petitioner was not assigned to a particular vessel or a fleet of vessels, he is a transitory maritime worker whose remedy is the LHWCA.

CONCLUSION

Since the petitioner has misstated the seaman status test employed by the Fifth Circuit in this case, and since the Fifth Circuit's test for seaman status is consistent with all decisions of this Court, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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